

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ALLEN RAY ADAMS II,

NO. C 03-04994 JW

Petitioner,

**ORDER DENYING PETITION  
FOR WRIT OF HABEAS CORPUS**

v.

ROY CASTRO,

Respondent.

**I. INTRODUCTION**

Petitioner Allen Ray Adams II (“Petitioner”) filed a petition for a writ of habeas corpus in this Court on November 10, 2003 contesting a Humboldt County jury verdict, which resulted in a conviction of (1) one count of first degree murder with a deadly weapon; (2) assault with a deadly weapon, with the intent to commit great bodily harm; and (3) simple assault. Petitioner was acquitted of attempted first degree murder. The First Appellate District of the California Court of Appeal affirmed the conviction and the California Supreme Court denied review. Having exhausted his state remedies, this Court now reviews Petitioner’s request pursuant to authority under 28 U.S.C. § 2254. Petitioner raises numerous constitutional issues, *inter alia*, his right to due process and equal protection, his right to effective assistance of counsel and effective expert witness, and his right to present a defense and to have trial by jury. (See Pet. for Writ of Habeas Corpus.) After examining the record and the papers submitted by the parties in support of their respective positions, the Court denies the petition.

## II. BACKGROUND

### A. The Attack on May 6, 1995

Petitioner, age seventeen at the time of arrest, was charged with the first degree murder of Mark Sheive ("Sheive"), attempted first degree murder of Patrick McKay ("McKay"), and assault on Donald Counts ("Counts"). On about midnight on May 6, 1995, Petitioner and his friends, who were all teenagers, brought two or three 12-packs of bottled beer to the home of Blaine and Brent Seaman to drink, as the Seaman brothers' parents were not home.<sup>1</sup> (Mem. of Points and Authorities in Supp. of Answer ("Answer") at 2:18-19.) Prior to arriving at the Seaman residence, Petitioner allegedly drank one-half of a sixteen-ounce vodka-cranberry drink with Jackie Burrow, a 22 year old friend, who purchased the 12-packs of beer for the teenagers. (Mem. of Points and Authorities in Supp. of Pet. ("Pet.") Ex. A at ¶ 5 and Pet. Ex. C at ¶ 3.)

By approximately 1:30 a.m., Petitioner, Daniel Osborne, David Rasor and Blaine Seaman consumed the remaining beers. (Answer at 2:19.) In an effort to dispose of the empty bottles before the Seamans' parents returned, three of them – Petitioner, Rasor and Osborne – gathered the bottles, placed them into two 12-pack cartons, and went outside to the intersection of Girard Court and Harris Street. (Pet. at 5:22-25; Pet. Ex. A ¶ 17.) The three youths began to throw the empty bottles into a wooded area on the south side of Harris Street, with Blaine Seaman later joining the activities. (Pet. Ex. A ¶ 18.)

While Petitioner, Osborne, Rasor, and Blaine Seaman were outside at the intersection of Girard Court and Harris Street throwing bottles, Counts, a homeless man, walked by with his girlfriend. (Answer at 3:2.) Someone in the group asked Counts, who was smoking at the time, for a cigarette, but Counts declined. (Answer at 3:3; Pet. Ex. A ¶ 20.) The group surrounded and taunted Counts. Petitioner struck Counts over the head with a beer bottle. (Answer at 3:3-4; Pet. Ex. A ¶ 20.) The group continued to hassle Counts until Osborne told the group to leave him alone and told Counts to leave. (Answer at 3:4.)

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<sup>1</sup> There was a discrepancy in the evidence as to the amount of beer the teenagers purchased and drank. Only two 12-pack cartons were found at the scene. However, Petitioner claims that once he arrived at the Seaman residence, he placed one 12-pack in the bathroom and gave the remaining two 12-packs to his friends, Daniel Osborne, David Rasor and Blaine Seaman. (Pet. Ex. ¶ 14.)

1 Counts later reported the incident and his injuries to the sheriff's deputy. (Answer at 3:5-6.)

2        Shortly after Counts left the scene, Sheive and McKay, both twenty-eight years old, were driving  
3 on Harris Street in Sheive's truck, returning to Eureka from an evening of drinking at Marino's Bar in  
4 Arcata. (Pet. at 6:5-7.) Both men had allegedly consumed five pints of beer and ingested marijuana during  
5 the two to three hours they spent at the bar. (Pet. at 6:7-9.) Sheive had also allegedly ingested  
6 Benzodiazepine, a controlled substance.<sup>2</sup> Id.; (Pet. Ex. K and Ex. L.; Rep. Tr. 79:12-19.) When Sheive's  
7 truck passed Girard Court, someone in Petitioner's group threw a beer bottle at it, which prompted Sheive  
8 to make a U-turn and return to the group of teenagers standing on the street. (Answer at 3:8-10.) Sheive  
9 and McKay stepped out of the car, demanding to know who threw the bottle at them. A loud and angry  
10 verbal confrontation ensued. (Answer at 3:11.)

11        At one point during the confrontation, McKay pushed Razor in the chest with both hands. (Pet. Ex  
12 A ¶ 31.) Petitioner left the scene and went to the Seamans' garage to retrieve a baseball bat. Id. Brian  
13 Chipps, a friend of Petitioner's, arrived at the scene and parked behind Sheive's truck. When Petitioner  
14 returned to the scene holding a bat behind his back, he allegedly "made a wide circle back to the scene,  
15 crouching behind the parked cars."<sup>3</sup> (Answer at 3:16.) As Petitioner reached the group, he allegedly saw  
16 McKay push Blaine Seaman and thought that Sheive and McKay were about to beat up Blaine. (Pet. Ex.  
17 A ¶ 34.) Petitioner walked up behind Sheive and McKay, first swung the bat at Sheive, hitting him on the  
18 head, and then swung the bat at McKay, hitting him on the head and then again in the ribs. (Answer at  
19 3:16-17.) Although McKay was able to get back up with no fatal injury, Sheive was knocked  
20 unconscious and later died on May 9, 1995 from head injuries consistent with being struck with a baseball  
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22        <sup>2</sup> Evidence of Sheive and McKay's intoxication was not presented in trial.

23        <sup>3</sup> Petitioner disputes this characterization of his return to the scene. He contends that "[a]fter  
24 finding the baseball bat, [he] left the Seaman house and walked directly toward the group in the street."  
25 (Pet. Ex A ¶ 33.) Petitioner also contends that James Flower, Defendant's counsel at the time, failed to  
26 clarify Deputy Lawson's testimony about Petitioner's initial statement to him regarding an unknown third  
27 party who was "crouched down" behind a car. (Answer at 36:9-10.) Deputy Lawson questioned  
28 Petitioner prior to his arrest at the Seaman Residence. (Answer at 4:5.) Petitioner alleges that the jury was  
left with the erroneous impression that the statement made to Deputy Lawson was a description of  
Petitioner's own actions. (See Pet. at 40.)

1 bat. (Answer at 3:17-18; Pet. at 9:3-4.)

2 Immediately, Osborne took the bat away from Petitioner and said, "You're stupid. I hope you  
3 didn't kill him." (Answer at 3:19; Pet. at 8:18.) Petitioner, who appeared scared, surprised and confused,  
4 replied, "I hope I didn't either." (Answer at 3:20; Pet. at 8:18.)

5 **B. The Investigation**

6 Shortly after 2:00 a.m., while the paramedics were still rendering medical assistance to Sheive and  
7 McKay, Deputy John Sylvia of the Humboldt County Sheriff's Department arrived at the scene. (Answer  
8 at 3:24.) When Deputy Sylvia spoke to Petitioner, he detected the odor of alcohol on Petitioner's breath  
9 and noted that Petitioner appeared intoxicated. (Answer at 4:2; Pet. at 8:22-23.) Petitioner and Rasor  
10 falsely told Deputy Sylvia that an unknown third party "[came] from behind the parked cars, hit the two  
11 victims with a baseball bat while they were talking to David Rasor, and then fled." (Answer at 4:2-3.)

12 Petitioner was later arrested after two other sheriff's deputies, Deputy Lawson and Deputy Knight,  
13 questioned both Petitioner and Osborne at the Seaman residence. (Answer at 4:5.) Ten beer bottle caps  
14 were found in Petitioner's jacket pocket at the time of arrest. (Answer at 4:10.) On the way to the  
15 sheriff's station, Petitioner "told Deputy Knight that he had been afraid the two victims were going to assault  
16 Blaine Seaman and beat up his friends. . . . [Petitioner] also remarked that he wished he had hit them in the  
17 legs, not in the head." (Answer 4:10-12.)

18 **C. State Criminal Trial Proceedings**

19 On May 10, 1995, James Flower, a public defender in the Humboldt County Public Defender's  
20 Office assigned to the Juvenile Court, was appointed to represent Petitioner since he was only seventeen  
21 years of age at the time of the incident. (Pet. Ex. J 2:21.) At that time, the public defender had been  
22 practicing law for over ten years. (Pet. Ex. J at 3:13-14.) Petitioner's counsel had only handled one adult  
23 criminal jury trial prior to Petitioner's case and was still required to maintain a large caseload of juvenile  
24 delinquency cases. However, following the determination that Petitioner was unfit for treatment in Juvenile  
25 Court, he continued to represent Petitioner. (Pet. Ex. J at 3:20-22; Pet. Ex. VV.) Petitioner's counsel  
26 allegedly informed Petitioner and his family of his lack of experience in dealing with an adult murder trial,  
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1 however, Petitioner's parents remained satisfied with Petitioner's counsel. (Pet. Ex. VV at ¶ 5.) At the  
 2 time of the trial, the Public Defender's office employed only ten attorneys. (Pet. Ex. J at 3:17.)

3 At trial, despite Petitioner's expressed desire to testify at trial, Petitioner's counsel strongly advised  
 4 Petitioner not to testify for fear that the prosecutor would introduce prior incidents of violence by Petitioner,  
 5 which he believed to be damaging to the defense.<sup>4</sup> (Answer to Order to Show Cause Ex. 6 ¶ 4; Pet. Ex. A  
 6 ¶ 39.) Furthermore, Petitioner's counsel believed that Petitioner's credibility would be destroyed on cross-  
 7 examination by Deputy District Attorney Worth Dikeman. (Answer to Order to Show Cause Ex. 6 ¶ 6.)

8 The only person to testify on behalf of Petitioner at the jury trial was Dr. Stephen Pittel, a forensic  
 9 psychologist, testifying as an expert on alcohol use and its effect on human feelings, thoughts and  
 10 behaviors.<sup>5</sup> Dr. Pittel prepared a series of estimates of Petitioner's blood alcohol concentration ("BAC")  
 11 using (1) Petitioner's weight, (2) the size and time of his last meal, (3) the amounts and times of his  
 12 consumption of alcohol, and (4) corroboration of this information from sources other than Petitioner. (Pet  
 13 Ex. HH at ¶ 8.) Dr. Pittel calculated the BAC estimates, which ranged from .1533 to .2572 "depending on  
 14 whether [Petitioner] consumed 8, 10, 11, or 12 bottles and whether the beer was consumed in 1 ½ hours  
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18 <sup>4</sup> There was one incident where Petitioner and his friends allegedly threw pennies at people from a  
 19 moving car, with one hitting Carl Faulkner, who was walking down the road. After they threw the penny,  
 20 Petitioner allegedly got out of the car and proceeded to beat up Faulkner for no apparent reason, causing  
 21 serious injury. (Answer to Order to Show Cause Ex. 6 ¶ 5.) Petitioner's counsel stated that "this incident  
 22 was similar to the one at issue in the trial, because in both cases [Petitioner] and his friends tried to provoke  
 23 the victim by throwing something at them, and [Petitioner] was the only one of the group who then inflicted  
 24 physical harm on the victim." *Id.* However, Petitioner claims that the incident was "very minor, that no one  
 25 was injured and that the versions of these incidents that Mr. Petitioner's counsel related to [Petitioner] were  
 26 not accurate." (Pet. Ex. A at ¶ 39.)

27 <sup>5</sup> Jackie Burrow, the person who purchased the beer for Petitioner, was not called as a witness on  
 28 Petitioner's behalf. Petitioner contends that Jackie Burrow could have testified that Petitioner consumed  
 one-half of a 16-ounce vodka-cranberry mixed drink and that she purchased three 12 packs of beer for the  
 under-aged boys. (Pet. at Ex. A at ¶ 45 and Ex. C at ¶¶ 3,8.) Petitioner's counsel allegedly informed him  
 that he "decided not to call Burrow at the trial because he did not need her to establish the amount of beer  
 purchased." (Pet. Ex. A at ¶ 44.) However, Petitioner's counsel alleges that no other witnesses were  
 called in the defense case because everyone that "had knowledge concerning the incident [was] called by  
 the prosecution and were subject to his cross-examination." (Pet. Ex. J at 4:6-8.)

1 or 2 hours.”<sup>6</sup> (Answer at 4:19-20.) He opined that Petitioner’s BAC was between .19 and .24, and he  
 2 would have experienced mental confusion, distorted perception, difficulty in thinking, and impaired  
 3 judgment. (Answer at 4:22-23.)

4 On cross-examination, it was revealed that Dr. Pittel had been arrested for possession of cocaine in  
 5 1990. (Pet. at 3:15.) During a break, the prosecutor obtained a copy of the police report of the arrest,  
 6 and when trial resumed, questioned Dr. Pittel about the arrest. (Pet. Ex. J at 3:11-12.) Petitioner’s counsel  
 7 immediately moved to strike the evidence and for a mistrial. (Answer at 21:8.) The trial court denied both  
 8 motions, finding that Petitioner’s counsel was aware of the arrest,<sup>7</sup> and that the evidence was “a proper  
 9 subject of cross examination for bias.” (Answer at 21:20-21.) However, the trial court issued a limiting  
 10 instruction, directing the jury to consider the evidence “only for the limited purpose of determining if it tends  
 11 to show whether Dr. Pittel has any bias against law enforcement or the criminal justice system and whether  
 12 that bias renders unreliable opinions to which Dr. Pittel has testified concerning the charges against the  
 13 defendant.” (Answer at 21:28, 22:1-2.)

14 At the conclusion of the trial, the trial court gave jury instructions on murder by lying in wait over  
 15 Petitioner’s counsel’s objections. The jury returned a verdict against Petitioner, convicting him of first  
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18 <sup>6</sup> Dr. Pittel alleges that if he had known and used the correct weight of Petitioner to calculate the  
 19 BAC estimates, which was 181 pounds and not 165 pounds, the prosecutor would not have been able to  
 20 use this discrepancy to attack his testimony. (Pet. Ex. HH at ¶ 9.) Dr. Pittel also contends that his BAC  
 21 estimates for Petitioner would have increased to at least .26 at the time of the incident if Petitioner’s counsel  
 22 had given him additional corroborated and available information that Petitioner (1) had not eaten for several  
 23 hours before drinking on the night of the incident, (2) consumed about one-half of a large vodka-cranberry  
 drink, and (3) consumed 10 bottles of beer between midnight and 1:20 a.m. with a 40 minute lapse  
 between the time Petitioner finished drinking the beer and the assault upon Sheive at 2:00 a.m. (Pet. Ex.  
 HH ¶¶ 9-15.)

24 <sup>7</sup> Although Petitioner’s counsel first contacted Dr. Pittel to act as an expert in Petitioner’s case on  
 25 November 8, 1995, Petitioner’s counsel was unaware of Dr. Pittel’s prior arrest until Dr. Pittel revealed  
 26 this information during a telephone conversation on March 8, 1996. (Pet. Ex. J at 3:4-5.) Despite  
 27 Petitioner’s counsel’s awareness of Dr. Pittel’s arrest before the start of trial, he stated that he felt that his  
 “hands were tied, as [he] was unsure of having the time and available resources to procure another helpful  
 expert,” and continued to call him as an expert for Petitioner’s case. (Pet. Ex. VV at ¶ 21.) Furthermore,  
 Petitioner’s counsel claims that he relied on controlling case law which indicated that he would receive a  
 warning if the District Attorney decided to use the arrest to impeach Dr. Pittel. (Pet. Ex. VV at ¶ 22.)

1 degree murder of Sheive, assault with a deadly weapon on McKay, and simple assault on Counts.<sup>8</sup> (Pet.  
2 Ex. E at 5.) Petitioner was sentenced to prison for 25 years to life for murder with consecutive terms of 3  
3 years and 180 days for the assaults, in addition to 4 years for use of a deadly weapon in the murder and for  
4 infliction of great bodily injury in the assault on McKay. Id.

#### 5 **D. Procedural History**

6 Petitioner appealed his conviction, and the California Court of Appeal affirmed, finding no error in  
7 allowing the prosecution to use Dr. Pittel's arrest record for impeachment. (Pet. Ex. E at 1.) The  
8 California Supreme Court denied Petitioner's application for review. (Pet. Ex. F.) Petitioner then filed a  
9 petition for writ of habeas corpus in the California Superior Court in Humboldt, which was subsequently  
10 denied on its merits on April 29, 2002. (Pet. Ex. J.) The California Court of Appeal and the California  
11 Supreme Court also denied the petition for writ of habeas corpus. (Pet. Ex. GG and WW.)

12 Having exhausted his state remedies, the Petitioner is now before this Court, seeking a federal  
13 habeas corpus petition. Petitioner raises numerous constitutional issues, inter alia, his right to due process  
14 and equal protection, his right to effective assistance of counsel and effective expert witness, and his right to  
15 present a defense and to have trial by jury. (See Pet. for Writ of Habeas Corpus.) Petitioner's claims that  
16 his rights under the Fifth, Sixth, and Fourteenth Amendments were violated based upon: (1) trial counsel's  
17 failure to call Petitioner as a witness; (2) trial counsel's failure to introduce exculpatory evidence; (3) trial  
18 counsel's decision to call an expert witness; (4) trial counsel's closing argument; (5) trial counsel's  
19 numerous additional errors; (6) trial court's erroneous jury instruction on murder by lying in wait; (7)  
20 insufficient evidence of lying in wait; (8) insufficient evidence to support a finding of premeditation and  
21 deliberation; and (9) the cumulative effect of the constitutional errors at trial.

### 22 **III. STANDARDS**

23 This Court may "entertain an application for a writ of habeas corpus in behalf of a person in  
24 custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the  
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26 <sup>8</sup>Petitioner was acquitted of the separately charged offense of attempted willful, deliberate and  
27 premeditated murder of Patrick McKay.



1 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19,  
2 21 (1975). Under the first prong of the Antiterrorism and Effective Death Penalty Act of 1996  
3 (“AEDPA”), a federal court has the authority to grant a writ of habeas corpus if the state court’s decision  
4 on the merits was “contrary to, or involved an unreasonable application of, clearly established federal law,  
5 as determined by the Supreme Court of the United States.” § 2254(d)(1); see Lockyer v. Andrade, 123 S.  
6 Ct. 1166, 1172-73 (2003).

7 A state court decision is “contrary to” clearly established federal law if the “state court arrives at a  
8 conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court  
9 decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts.”  
10 Williams v. Taylor, 529 U.S. 362, 413 (2000). An “unreasonable application” of governing legal  
11 principles from the Supreme Court arises when a state court identifies the correct legal principle, “but  
12 unreasonably applies that principle to the facts of the prisoner’s case.” Id.

13 The habeas applicant bears the “burden to show that the state court applied federal law to the facts  
14 of his case in an objectively unreasonable manner . . . [which] is different from an incorrect application of  
15 federal law.” Woodford v. Visciotti, 537 U.S. 19, 24 (2002). Furthermore, circuit decisions are relevant  
16 as persuasive authority to determine whether a particular state court holding is an “unreasonable  
17 application” of Supreme Court precedent or to assess what law is “clearly established.” Clark v. Murphy,  
18 331 F.3d 1062, 1070-71 (9th Cir. 2003).

19 Under the second prong of AEDPA, a federal court also has the authority to grant a habeas  
20 petition if the state court’s decision on the merits “resulted in a decision that was based on an unreasonable  
21 determination of the facts in light of the evidence presented in the State court proceeding.” § 2254(d)(2).  
22 Unless the applicant rebuts with clear and convincing evidence, the determination of a factual issue by a  
23 state court is presumed correct. See § 2254(e)(1). Where the state court fails to make findings of fact,  
24 however, the reviewing court grants less deference to the state court’s decision. Weaver v. Thompson,  
25 197 F.3d 359, 363 (9th Cir. 1999).

#### 26 IV. DISCUSSION



**I. Ineffective Assistance of Counsel**

Petitioner alleges that his counsel was ineffective for the following reasons: (1) failing to call petitioner as witness; (2) failing to introduce readily available exculpatory evidence; (3) calling an expert witness whose arrest prejudiced Petitioner; (4) giving an incompetent closing argument; and (5) committing additional errors.

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id. at 686. Therefore, to prevail on an ineffective assistance of counsel claim, Petitioner must establish two things. First, Petitioner must establish that counsel's performance was deficient, meaning, that it fell below an "objective standard of reasonableness" under prevailing professional norms. Strickland, 466 U.S. 687-88. Second, Petitioner must establish that he was prejudiced by counsel's deficient performance. Id. at 694. Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. A court need not determine whether counsel's performance was deficient if the lack of prejudice is clear. Id. at 697.

The Strickland framework for analyzing ineffective assistance of counsel claims is considered to be the clearly established federal law, as determined by the Supreme Court of the United States for the purposes of 28 U.S.C. §2254 analysis. Williams, 529 U.S. at 405. In order to show deficient performance under Strickland, Petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. The relevant inquiry is not what defense counsel would have done, but rather whether the choices made by defense counsel were reasonable. The reasonableness of counsel's decisions must be measured against the prevailing legal norms at the time counsel represented Petitioner. Wiggins v. Smith, 123 S. Ct 2527, 2536-

37 (2003) (citing American bar Association professional standards and standard practice in capital defense at pertinent time).

For the reason discussed below, the Court concludes that the ineffective assistance of counsel claims fail because the actions taken by Petitioner's counsel were reasonable and Petitioner was not prejudiced.

**A. Counsel's failure to call Petitioner as a witness**

Petitioner alleges that his defense counsel provided ineffective assistance in failing to call him as a witness. Moreover, Petitioner alleges that the denial of the right to testify had a substantial and injurious effect on the verdict. Petitioner's arguments are without merit.

When a defendant, "on advice of counsel, knowingly and voluntarily, if reluctantly, refrained from testifying in his own defense," no constitutional error occurs. Campbell v. Vaughn, 209 F.3d 280, 291 (3<sup>rd</sup> Cir. 2000). Petitioner's counsel may have forcefully urged Petitioner not to testify, however, counsel also said Petitioner could make the final decision. Furthermore, counsel's advice was imminently reasonable given Adam's past. Petitioner had been involved in (1) an assault on a man named Carl Faulkner in Eureka in October 1994; (2) an assault on a transient about a month before the homicide; and (3) several vehicle thefts resulting from Petitioner's unlawfully driving cars taken from a gas station where Petitioner worked. The prosecutor indicated that he did not intend to introduce evidence of the prior bad acts in his case in chief. However, he also stated that the evidence of assaults would be admissible under Cal. Evidence Code § 1103 if Petitioner attempted to show that he had a non-violent character, and that the vehicle thefts would come into play as evidence of moral turpitude only if Petitioner testified. Respondent's Answer at 7. Understandably, counsel did not want Petitioner to testify because he believed that the prior bad acts would be devastating to Petitioner's defense.

**B. Failure to introduce readily available exculpatory evidence**

Petitioner contends that his counsel was ineffective because he did not introduce evidence concerning the amount of alcohol consumed by Petitioner. Petitioner's mental state and the extent of his intoxication were vitally important to the defense's case. However, the additional evidence likely would not

1 have changed the outcome of the case, and the claim is therefore without merit. There was compelling  
2 evidence that, regardless of whether two or three twelve-packs of beer were purchased, Petitioner was not  
3 so impaired that he could not form the requisite mental state for first degree murder. The sheriff who  
4 interacted with Petitioner shortly afterwards did not find him drunk enough to justify public intoxication.  
5 More importantly, Petitioner had the mental faculty to fabricate a story of a stranger committing the attacks  
6 as a coverup, thereby refuting his claim that he was too drunk to form specific intent.

7 **C. Decision to call expert witness**

8 Petitioner contends that he received ineffective assistance of counsel and was denied the right to  
9 expert assistance because the expert witness, Dr. Pittel, had been previously arrested for cocaine  
10 possession. The Court rejects the argument.

11 In Ake v. Oklahoma, 470 U.S. 68, 83 (1985), the Supreme Court held that due process requires  
12 indigent defendants to be provided with “access to a competent psychiatrist,” a role which Dr. Pittel  
13 adequately fulfilled. Petitioner cites no Supreme Court authority holding that Ake encompasses a right to a  
14 mental health expert who is immune from impeachment. Furthermore, it is significant that the jury was given  
15 an instruction that it could consider Dr. Pittel’s arrest for the limited purpose of determining if it tends to  
16 show whether Dr. Pittel has any bias against law enforcement.

17 **D. Counsel’s closing argument**

18 Petitioner contends that he received ineffective assistance of counsel at closing argument, and that  
19 his appellate counsel was ineffective for failing to raise this issue on direct appeal.

20 The United States Supreme Court recently summarized the standard for evaluating the effectiveness  
21 of defense counsel’s closing argument on federal habeas review. “The Sixth Amendment guarantees  
22 reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough v Gentry,  
23 124 U.S. at 6. Moreover, “counsel has wide latitude in deciding how best to represent a client, and  
24 deference to counsel’s tactical decisions in his closing presentation is particularly important because of the  
25 broad range of legitimate defense strategy at that stage.” Yarborough v Gentry, 124 U.S. at 4.

26 Trial counsel’s technique in delivering his closing argument relied upon establishing credibility with  
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the jurors. Counsel did so by acknowledging how “shocking” the case was, and what a senseless tragedy had occurred. Counsel went on, however, to argue that Petitioner did not have the requisite statement of mind for the charged crimes. Counsel’s tactical approach was not ineffective. The ample evidence in this case indicates that trial counsel’s closing argument was well within the general standard of care required for federal habeas review.

#### **E. Numerous additional errors**

Petitioner contends that trial counsel made additional errors, which considered cumulatively, deprived him of effective assistance of counsel. This Court finds that individually, as well as cumulatively, these instances did not prejudice Petitioner adequately to constitute ineffective assistance of counsel.

#### **II. Trial Court’s Instructions on Lying in Wait**

Petitioner claims that the lying in wait instruction given to the jury violated due process, and that his appellate counsel was ineffective for failing to raise this claim on direct appeal.

A claim of state instructional error can be the basis of federal habeas relief only if the error “so infected the entire trial that the resulting conviction violates due process.” Estelle v. McGuire, 502 U.S. at 72. The mere fact that an instruction was allegedly incorrect under state law is not a basis for habeas relief. Id. at 71-72. The test for constitutional error is whether there is a “reasonable likelihood” the jury applied the instructions in a way that prevented consideration of constitutionally relevant evidence. Boyde v. California, 494 U.S. 370, 380 (1990). The challenged instruction must be evaluated in light of the instructions as a whole and the evidence introduced at trial. Estelle, 502 U.S. at 72. If the habeas court finds constitutional error under the Boyde test, it must then assess prejudice by determining whether the error “had substantial and injurious effect or influence in determining the jury’s verdict.” Calderon v. Coleman, 525 U.S. 141, 147 (1998)(per curiam) (quoting Brecht v. Abrahamson, 507 U.S. 610, 637 (1993)).

The trial court gave the following challenged instruction on lying in wait:

Murder which is immediately preceded by lying in wait is murder of the first degree. The term “lying in wait” is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise even though the victim is aware of the murderer’s presence. The lying in

1 wait need not continue for any particular period of time provided that its duration is such as  
2 to show a state of mind equivalent to premeditation or deliberation. The word  
3 “premeditation” means considered beforehand. The word “deliberation” means formed or  
arrived at or determined upon as a result of careful thought and weighing of considerations  
for and against the proposed course of action.

4 If you find that the defendant was voluntarily intoxicated, you must consider the fact of such  
5 intoxication in your determination of whether the defendant possessed a state of mind  
6 equivalent to premeditation or deliberation prior to the assault. If you have a reasonable  
doubt as to the defendant’s ability to form or possess such a state of mind you must find  
that he did not have the ability to lay in wait to murder Mr. Sheive.

7 (RT 672:27 - 673:22.) Petitioner contends the instruction failed to include every element of lying  
8 in wait, because it stated that lying in wait occurs when its duration shows a state of mind equivalent  
9 to “premeditation *or* deliberation” but California law requires premeditation *and* deliberation for  
10 first degree murder. Petitioner also argues that California law requires a “substantial” period of  
11 watching and waiting. He contends that the instruction violated due process, and also deprived him  
12 of his “only viable defense,” that he did not exhibit a substantial period of watching and waiting that  
13 was equivalent to premeditation and deliberation.

14 This Court adopts the reasoning of the California Supreme Court, and concurs that the  
15 instruction was not erroneous under California law. Furthermore, even if the instruction was  
16 erroneous, which it was not, such purported error was not sufficiently grave that it “so infected the  
17 entire trial that the resulting conviction violates due process.” Estelle v. McGuire, 502 U.S. at 72.  
18 As the California Supreme Court observed, the jury was told in a separate instruction that a wilful,  
19 deliberate *and* premeditated killing with malice aforethought is murder of the first degree.

### 20 **III. Evidence of Premeditation and Deliberation**

21 Petitioner contends that there was insufficient evidence of premeditation and deliberation to  
22 support his conviction for first degree murder, and his appellate counsel was ineffective in failing to  
23 raise this issue on direct appeal. Petition at 23-24; Memorandum at 71-76.

24 A state prisoner who alleges that the evidence was insufficient to support a guilty verdict  
25 beyond a reasonable doubt states a constitutional claim, which, if proven, entitles him to federal  
26 habeas relief. See Jackson v. Virginia, 443 U.S. 307, 321 (1979). A federal court reviewing  
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1 collaterally a state court conviction does not determine whether it is satisfied that the evidence  
2 established guilt beyond a reasonable doubt. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992).  
3 The federal court “determines only whether, after viewing the evidence in light most favorable to the  
4 prosecution, any rational trier of fact could have found the essential elements of the crime beyond a  
5 reasonable doubt.” Id.; Jackson v. Virginia, 443 U.S. 307, 319 (1979).

6 Under California law, “deliberation” refers to careful weighing of considerations in forming a  
7 course of action. “Premeditation” means thought over in advance. Premeditation and deliberation  
8 are do not require any extended period of time. The true test is not in the duration of time as much  
9 as it is the extent of the reflection. People v. Cole, 33 Cal. 4th at 1224, citation omitted. Thoughts  
10 may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.

11 Id.

12 Petitioner, relying on People v. Anderson, 70 Cal. 2d 15, 26-27 (1968), contends that  
13 before premeditation and deliberation are established, the prosecution must present evidence of  
14 planning, manner, and motive. Although planning, manner, and motive have been used extensively  
15 as guidelines to establish premeditation and deliberation, the Court subsequently held that these  
16 categories are “descriptive, not normative,” and are “simply an aid for reviewing courts in assessing  
17 whether the evidence is supportive of an inference that the killing was a result of preexisting  
18 reflection and weighing of considerations rather than mere unconsidered rash impulses.” People v.  
19 Cole, 33 Cal. 4th at 1224, citation omitted. In Perez, the Court further stated that “the Anderson  
20 factors, while helpful for purposes of review, are not a *sine qua non* to finding first degree  
21 premeditated murder, nor are they exclusive.” People v. Perez, 2 Cal. 4th 1117, 1125 (1992).

22 In any event, the prosecutor specifically argued that the evidence satisfied all three  
23 categories established by Anderson. He argued that Petitioner’s motive for the killing was to  
24 preserve his image as a “tough guy” who didn’t “take nothin’ from nobody.” Respondent’s Answer  
25 at 55. As for planning, the prosecutor argued that Petitioner decided to get a baseball bat in the  
26 garage, went back out to the scene of the confrontation, concealed the bat behind his back, and hit  
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1 the victims from behind without any warning. Id. The prosecutor also argued that the manner of  
2 the killing showed premeditation and deliberation because it was not a frenzied attack, resulting  
3 from an emotional outburst, but was a “cold calculated kind of killing because it’s a swing delivered  
4 with tremendous force at a very vulnerable part of the body.” Id. Viewed in a light most favorable  
5 to the prosecution, a rational trier of fact could have found the essential elements of crime beyond a  
6 reasonable doubt.

7 //

#### 8 **IV. Cumulative effect of the constitutional errors at trial**

9 As his final claim, Petitioner alleges that the cumulative effect of counsel’s alleged errors in  
10 representation denied him a fair trial. Petition at 24-26; Memorandum at 76-78.

11 In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the  
12 cumulative effect of several errors may still prejudice a defendant so much that his conviction must  
13 be overturned. Alcala v. Woodford, 334 F.3d 862, 893-95 (9th Cir. 2003) (reversing conviction  
14 where multiple constitutional errors hindered Defendant’s efforts to challenge every important  
15 element of proof offered by prosecution). However, where a petitioner has not demonstrated  
16 prejudice as to individual claims, no cumulative prejudice results. Davis v. Woodford, 333 F.3d  
17 982, 1007 (9th Cir. 2003), *amended*, 2003 U.S. App. Lexis 27909; see United States v. Rivera,  
18 900 F.2d 1462, 1472 (10<sup>th</sup> Cir. 1990) (“cumulative error analysis should evaluate only the effect of  
19 matters determined to be error, not the cumulative effect of non-errors”).

20 As noted by this Court in its discussion of issues I to VIII, Petitioner’s counsel acted  
21 reasonably and his actions did not cause any prejudice to Petitioner. Therefore this Court DENIES  
22 Petitioner’s contention that he was denied a fair trial due to cumulative error.

#### 23 **V. CONCLUSION**

24 The Court finds the California Court of Appeals’ determination of Petitioner’s claims did  
25 not result in a decision that was contrary to, or involved an unreasonable application of, clearly  
26 established federal law. Accordingly, the petition for writ of habeas corpus is DENIED. The clerk  
27



1 shall close the file.

2 Dated: November 30, 2005

03cv4994.habeas

/s/James Ware

JAMES WARE

United States District Judge

7 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

8 John R. Grele [jgrele@earthlink.net](mailto:jgrele@earthlink.net)

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11 **Dated: December 1, 2005**

**Richard W. Wicking, Clerk**

12 **By: /s/JW Chambers**

**Ronald L. Davis**

**Courtroom Deputy**